

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

AMENDED
DECISION AND ORDER

04-CV-6154L

v.

ANTHONY J. KONCO, et al.,

Defendants.

The United States commenced this mortgage foreclosure action on April 5, 2004, against mortgagors Anthony J. Konco, Jr. and Bernadette L. Konco, owners of the subject premises in Chemung County at 115 Lynhurst Avenue, Horseheads, NY 14845. Arnot Medical Services, the Chemung County Department of Social Services, and Jeffrey Barry, each of whom were determined to be potential creditors of the mortgagors, were also named as defendants. All of the party defendants were timely served with the complaint. None responded, and the clerk filed an entry of default on August 24, 2004.

On October 8, 2004, this Court entered a Judgment of Foreclosure and Sale, and directed the United States Marshal to sell the premises to the highest bidder. The sale was held on or January 12, 2005, and its proceeds left a surplus of \$9,726.35, upon which interest has accrued and continues to accrue. This surplus was deposited with the Clerk for later distribution.

Arnot Medical Services, P.C. and the Chemung County Department of Social Services both filed notices of claim to the surplus monies. (Dkt. #21 and #22). No other or further action was taken by any defendant or claimant to recover the surplus monies for nearly three years.

Pursuant to this Court's Decision and Order dated February 12, 2008, the United States filed a motion (Dkt. #24) requesting an order from the Court directing the Clerk as to how the surplus funds should be distributed. Notice of this proceeding was served upon Arnot Medical Services and the Chemung County Department of Social Services. Notices mailed to the mortgagors and defendant Jeffrey Barry were returned as undeliverable, and no updated address information has been filed by them, or is otherwise available, despite substantial efforts by the government to locate their current addresses.

Arnot Medical Services seeks satisfaction of a judgment recorded against Anthony J. Konco on June 14, 2001 in Elmira City Court in the amount of \$779.49 plus interest, the balance of which was calculated at \$1,192.88 as of March 31, 2008. The Chemung County Department of Social Services seeks payment on a mortgage note executed by the mortgagors on June 4, 2002, in the amount of \$1,875.20, together with interest at 12% per annum, the balance of which was calculated at \$2,556.44 as of April 24, 2008.

In my view, both claimants are entitled to recover from the surplus monies deposited with the Clerk, once plaintiff's attorney's fees in the sum of \$810.00 have been paid to counsel for the United States for prosecuting this surplus money proceeding. The claimants have properly filed claims and documented their entitlement to participate in the surplus money proceeding. The remaining defendants have not appeared, and/or have taken no action to establish their present

entitlement to any surplus money, and I find that they have defaulted from participation in the distribution. Although it may be true that a defendant in a mortgage foreclosure proceeding need not file a separate claim, that entity must still establish its entitlement to recover by providing sufficient evidence of the debt and its priority over other claims. *See Franklin Credit Management Corp. v. Pearlman*, 16 A.D.3d 617 (2nd Dept. 2005); *Federal Home Loan Mortg. Corp. v. Grant*, 224 A.D.2d 656 (2nd Dept. 1996).

CONCLUSION


The government's motion to distribute surplus funds (Dkt. #24) is granted, and the Clerk of the District Court is directed to distribute the surplus monies deposited in connection with this mortgage foreclosure proceeding as follows:

1. To the law firm Forsyth, Howe, O'Dwyer, Kalb & Murphy, P.C., attorney for the United States, the sum of \$810.00;
2. To Arnot Medical Services, P.C., Attention: James F. Evans, III, Esq., Robert P. Rothman, P.C., 120 East Washington Street, Syracuse, New York 13202-4093, the sum of \$1,192.88, with interest at \$.18 per diem calculated from March 31, 2008 to date; for a total of \$1,238.24;
3. To the Chemung County Department of Social Services, Attention: Charles D. Comstock, 425 Pennsylvania Avenue, P.O. Box 588, Elmira, New York 14902, the sum of \$2,556.44, with interest calculated at 12% per annum from April 24, 2008 to date; for a total of \$2,748.07.

IT IS FURTHER ORDERED that the residual surplus monies are awarded to the mortgagors, and will continue to be held by the Clerk pending the appearance of the mortgagors or other

appropriate claimants, subject to the deposit and abandonment procedures specified by 28 U.S.C. §§2041 et seq., and/or N.Y. Abandoned Property Law §§1200 et seq.

IT IS SO ORDERED.



DAVID G. LARIMER
United States District Judge

Dated: Rochester, New York
December 10, 2008